No. 77-976

In the Supreme Court of the United States

OCTOBER TERM, 1977

BILLY W. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
WILLIAM C. BROWN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-976

BILLY W. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 564 F. 2d 688. The opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1977. The petition for a writ of certiorari was filed on January 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a prosecution under 18 U.S.C. 1962(c) for the collection of unlawful debts incurred in connection with the business of gambling may be maintained in a state that proscribes gambling but does not in express terms proscribe "the business of gambling."

STATEMENT

In the first count of an indictment filed in the United States District Court for the Western District of Texas on February 12, 1976, petitioner and co-defendant Anthony Salinas were charged with conducting an enterprise affecting commerce through the collection of unlawful debts, in violation of 18 U.S.C. 1962(c).[1] Specifically, it was alleged that from 1971 to 1974 Salinas was engaged in the business of gambling and that petitioner was a loan officer in a bank in San Antonio, Texas (Pet. App. 6b). In order to collect his gambling debts, which were unlawful under Texas law (Texas Penal Code §47.03, effective January 1, 1974; Texas Penal Code, Art. 652a, repealed January 1, 1974), Salinas allegedly brought individuals who owed him gambling debts to petitioner, who would give the individuals bank loans to pay their gambling debts (Pet. App. 6b). It was further alleged that petitioner granted these loans without asking the recipients their purpose in seeking the loans and without requiring them to fill out an application form (*ibid.*).

Prior to trial, the district court dismissed this count of the indictment (Pet. App. A). On the government's appeal, the court of appeals reversed (Pet. App. B).

ARGUMENT

1. Petitioner challenges the court of appeals' determination that the indictment against him was erroneously dismissed. There is no reason for this Court to grant interlocutory review of the court of appeals' decision. The court of appeals' decision simply puts petitioner in the

[1]In the second count of the indictment, which is not in issue here, Salinas alone was charged with making a false statement in a loan application, in violation of 18 U.S.C. 1014.

same position that he would have been in had the district court denied his motion in the first instance. Such a denial would not have been subject to interlocutory appeal (see *Cobbledick* v. *United States*, 309 U.S. 323; *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327). Petitioner may be acquitted, in which case his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by way of a petition for a writ of certiorari seeking review of the final judgment.

2. In any event, there is no merit to petitioner's contention. The statute, 18 U.S.C. 1962(c), makes it unlawful for any person employed by or associated with an enterprise affecting commerce to conduct the affairs of such enterprise through collection of unlawful debts. The term "unlawful debt" is defined in 18 U.S.C. 1961(6) to include, *inter alia*:

> a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof * * * *and* (B) *which was incurred in connection with the business of gambling in violation of the law of* the United States, a *State* or political subdivision thereof * * *. [Emphasis added.]

The "unlawful debts" at issue in this case were alleged to be gambling debts incurred in violation of Texas law. Petitioner argues, however, that although Texas law proscribes various acts of gambling, it does not specifically proscribe the "business of gambling," and therefore the gambling debts in this case were not "unlawful debts" within the meaning of the statutory definition.

Contrary to this contention, the application of Section 1962 is not limited to conduct violating a state statute that proscribes conduct expressly termed the "business of

gambling." As this Court stated, in rejecting a similar argument in *United States* v. *Nardello,* 393 U.S. 286, 293, the "fallacy of this contention" is the assumption that Congress "incorporated state labels for particular offenses." The relevant inquiry is not the manner in which states classify their criminal prohibitions, but whether the particular state involved prohibits the gambling activity charged.

As the court of appeals properly concluded (Pet. App. 12b-14b):

> States making gambling illegal differentiate among levels of gambling activity. First, a state may enact a statute forbidding gambling and may enact a supplementary statute, perhaps with more severe penalties, against extensive gambling activity or against "commercial gambling." Second, a state may have a single statute, and may seek to proceed against extensive gambling activity by charging numerous violations of the same offense. The latter situation prevails in Texas, where no current statute expressly forbids the business of gambling. The particular means a state chooses to deal with the problem of commercial gambling, like the choice between the words "extortion" and "bribery" in *Nardello,* should not control the applicable federal anti-gambling law.
>
> The defendants do not seriously contend that the business of gambling is legal in Texas. If a single act of gambling is illegal, then gambling as a means of livelihood or as an ongoing commercial operation must be illegal as well. The defendants seek to seize upon the state's not classifying gambling as precisely as does the federal statute. But it was not the intent

> of Congress to attack gambling only in states that classify gambling along the federal model. [Footnote omitted.]

Moreover, Texas law does proscribe certain commercialized gambling, as well as single instances of gambling. Section 47.02 of the Texas Penal Code (1974) makes placing a single bet on a game or contest, or on a political election a misdemeanor. Section 47.03, in contrast, proscribes "Gambling Promotion," including the operation of a "gambling place," the receipt of bets or offers to bet, and the sale of chances or of lottery tickets. These activities—which are clearly commercial gambling—are made felonies. The indictment in this case charged that the unlawful debts in question were incurred in violation of Section 47.03.[2] The fact that the state statute did not use the phrase "business of gambling" is irrelevant.

Petitioner erroneously contends (Pet. 21-24), however, that the holding of the court below conflicts with its earlier decisions in *United States* v. *Hawes,* 529 F. 2d 472 (C.A. 5), and *United States* v. *Crockett,* 506 F. 2d 759 (C.A. 5), certiorari denied, 423 U.S. 824, and with decisions in other circuits, *United States* v. *Smaldone,* 485

---

[2]The indictment also alleged that the debts in question were incurred in violation of Texas Penal Code, Art. 652a(3) (repealed January 1, 1974), which proscribed the "business of bookmaking." The court of appeals concluded (Pet. App. 13b-14b n. 6) that the federal prosecution could not be based upon the collection of debts incurred in violation of this provision, because under state law these offenses could not be prosecuted after the repeal. However, as the court below recognized, the federal act refers to state law merely to define a generic category of conduct made illegal under federal law. Proof that the defendant violated the state statute is not an element of the federal offense, and a federal prosecution is not barred by limitations on the state's ability to prosecute, such as the running of the state statute of limitations. See *United States* v. *Frumento,* 563 F. 2d 1083, 1087 n. 8A (C.A. 3); *United States* v. *Forsythe,* 560 F. 2d 1127, 1135 (C.A. 3); *United States* v. *Revel,* 493 F. 2d 1 (C.A. 5), certiorari denied, 421 U.S. 909.

F. 2d 1333 (C.A. 10), certiorari denied, 416 U.S. 936, and *United States* v. *Berent*, 523 F. 2d 1360 (C.A. 9). Petitioner cites language from these cases which, he claims, indicates that Congress intended to incorporate state gambling offenses into federal law, not merely to refer to state law for definitional purposes. None of these cases involved the statutory provisions at issue here—Sections 1961 and 1962—instead, each dealt with 18 U.S.C. 1955.[3] But more importantly, none of these cases focused in any way upon the distinction petitioner seeks to draw, and none involved a claim that a federal reference to state law applies only when the state statute uses the exact terminology of the federal act. Accordingly, they in no way conflict with the decision of the court of appeals in the instant case.

3. Petitioner also argues (Pet. 24-28) that the court of appeals' construction of Section 1962(c) was so novel and unexpected that it deprived him of fair warning that his conduct was prohibited. There is no merit to this contention. The terms "gambling business" and "commercial gambling" are phrases of common understanding and that have been held pass constitutional muster. *United States* v. *Hawes, supra,* 529 F. 2d at 478; see also *United States* v. *Crockett, supra,* 506 F. 2d at 762. Furthermore, "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie,* 419 U.S. 544, 550. As the court of appeals emphasized, petitioner cannot seriously contend that he believed that the business of gambling was legal in Texas. The instant case does not involve simply "one act of

[3]Both the instant statute and 18 U.S.C. 1955 were enacted as part of the Organized Crime Control Act of 1970.

gambling" as petitioner suggests (Pet. 26); rather, the indictment alleged that co-defendant Salinas was engaged in the business of gambling for over three years, and that petitioner assisted the collection of numerous gambling debts on many occasions over that period in amounts totalling many thousands of dollars. Accordingly, petitioner had fair notice that he was collecting unlawful debts in violaton of Section 1962(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SIDNEY M. GLAZER,
WILLIAM C. BROWN,
Attorneys.

MARCH 1978.

DOJ-1978-03